STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JOSEPH CALEMME,

Plaintiff,

vs. Case No. 2005-3870-NI

RICHARD A. NAGY, JR., and HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana insurance company, qualified in Michigan,

Defendants.

_____/

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition.

Plaintiff filed this complaint on September 27, 2005. Plaintiff alleges that he was driving on eastbound 26 Mile Road in Macomb Township on August 13, 2005. Plaintiff alleges that he was driving a vehicle owned by his employer and insured by defendant Hartford. This policy purported to provide, *inter alia*, uninsured/underinsured motorist (UIM) coverage. Plaintiff alleges that defendant Nagy rear-ended a vehicle, which in turn struck plaintiff's vehicle. As a result of this collision, plaintiff alleges that he has suffered a closed head injury; fractures to his left arm, left hip, left leg and right leg; contusions, lacerations, and abrasions; injuries to the muscles, nerves, and ligaments of his back and neck; severe shock and injury to his nervous system; and other unspecified injuries. Plaintiff alleges that his injuries far exceed the liability insurance coverage of defendant Nagy, thereby triggering the application of defendant Hartford's UIM policy. However, plaintiff claims that defendant Hartford has so far resisted paying any

UIM benefits pursuant to its policy. Plaintiff has brought Count I, for negligence, as to defendant Nagy, and Count II, for breach of contract, as to defendant Hartford.

In his present motion, plaintiff additionally alleges that Chubb Insurance Company paid him worker's compensation benefits, and has intervened as a "silent intervening plaintiff" by stipulation of the parties. Plaintiff avers that Chubb will attempt to file a worker's compensation lien on any eventual recovery plaintiff receives from defendants.

Plaintiff brings this motion for partial summary disposition under MCR 2.116(C)(8) and (C)(10). A request for summary disposition under MCR 2.116(C)(8) may be granted if the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial, resolving all reasonable inferences in the nonmoving party's favor. *Id.*

In support of his motion for partial summary disposition, plaintiff notes that the Hartford insurance policy states that no duplicate benefits will be paid. Plaintiff avers that Chubb is nevertheless entitled to a statutory lien on any recovery that he may receive from Hartford. Therefore, plaintiff argues that, to the extent that "duplicate" benefit provider Chubb is entitled to a statutory lien, Hartford cannot reduce benefits pursuant to the policy's anti-duplication clause. Plaintiff also argues that any reductions pursuant to the policy's anti-duplication clause

must be calculated based on plaintiff's entire loss, rather than the policy limits of either insurance policy.

In response, defendant Hartford argues that intervening plaintiff Chubb Insurance Group cannot place a lien on plaintiff's recovery under MCL 418.827 (the basis for the statutory lien alleged by plaintiff) since plaintiff's action against Hartford sounds in contract rather than tort. As such, Hartford claims that it is entitled to reduce the benefits it pays plaintiff to the extent that Chubb has already paid "duplicate" benefits. Defendant Hartford also argues that, irrespective of MCL 418.827, the insurance policy itself precludes plaintiff from recovering UIM benefits for lost wages to the extent that such benefits have already been paid by Chubb.

On the day of the hearing on this motion, silent intervening plaintiff Chubb provided the Court and the parties with a reply to defendant Hartford's response. In this reply, Chubb argues that MCL 418.827(5) does not limit worker's compensation carriers to liens in tort actions. Therefore, Chubb avers that it is entitled to assert a lien on plaintiff's collection, if any, against Hartford. Chubb requests that this Court grant partial summary disposition finding that Hartford is precluded from reducing plaintiff's UIM claim.

First of all, the Court is satisfied that Chubb cannot place a lien on any recovery plaintiff may have against Hartford. MCL 418.827(1) provides that, in circumstances "[w]here the injury for which compensation is payable" under the worker's compensation act arose out of "circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof[,] . . . the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section." A worker's compensation insurer may "recover any amount which the employee or his or her dependants or personal representative

would be entitled to recover in an *action in tort*." MCL 418.827(5) (emphasis added). In other words, "where an employee who has received worker's compensation benefits recovers damages in a third-party tort action, the payor . . . of the worker's compensation benefits may seek reimbursement for the amount of compensation paid to the injured employee from any recovery obtained by the employee against the third-party *tortfeasor*, regardless of the type of damages recovered." *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 651 NW2d 811 (2002) (emphasis added).

In the case at bar, there is no question that plaintiff has brought a tort action against defendant Richard Nagy. However, actions to recover UIM benefits are contract actions. See, e.g., *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998). As such, plaintiff's cause of action against defendant Hartford sounds in contract rather than tort. Since plaintiff's lawsuit against Hartford is not an action in tort, Chubb cannot place a lien under 418.827 on any recovery that plaintiff may eventually receive from Hartford.[1] Therefore, plaintiff's request that the Court prevent Hartford from reducing plaintiff's UIM benefits must be denied.

Moreover, plaintiff's request for partial summary disposition concerning benefit reductions should also be denied based on the plain language of the insurance policy. Neither plaintiff Calemme nor silent intervening plaintiff Chubb have cited any binding authority precluding a UIM insurance provider from reducing benefits because of third party payments subject to statutory reimbursement. Generally speaking, "collateral sources" in tort actions do

[1] Chubb erroneously cites *Pro-Staffers*, *supra* at 325, in support of its assertion that "Chubb's lien on the proceeds in this claim is valid and enforceable regardless of the type of allegations in the underlying civil suit (i.e. tort, contract, medical malpractice, products liability, etc.) and regardless of the type of damages recovered." However, this is a mischaracterization of the cited authority. In fact, the cited authority provides no basis for placing a worker's compensation lien on a plaintiff's recovery in a contract action.

not include "entit[ies] entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages." MCL 600.6303(4). However, where recovery is premised on contract, "the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993) (rejected on other grounds). Because UIM insurance is not legally mandated, "the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts." *Mate, supra* at 19.

Plaintiff Calemme's reliance on *Bradley v Mid-Century Ins Co*, 409 Mich 1; 294 NW2d 141 (1980), is misplaced. *Bradley* provides that that "[i]nsurers cannot create [insurance] policies that defeat our laws or deprive an injured party of proper relief." [2] However, this case was overruled by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62-63; 664 NW2d 776 (2003), wherein the Supreme Court held that "parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement." The Court therefore held that "the rule of reasonable expectations," as expressed in *Bradley* and other cases, "has no application in Michigan, and those cases that recognized this doctrine are to that extent overruled." *Id.* at 63.

The insurance policy at issue specifically provides that Hartford "will not make a duplicate payment under this Coverage for any element of 'loss' for which payment has been made by or for anyone who is legally responsible." The policy also provides that Hartford "will not pay for any element of 'loss' if a person is entitled to receive payment for the same element of 'loss' under any workers' compensation, disability benefits or similar law." This language

unambiguously indicates that the coverage provided under the Hartford policy does not extend to provide coverage which would duplicate a payment made by a legally responsible third party. As such, plaintiff is contractually precluded from receiving benefits from Hartford which duplicate benefits paid by Chubb.

On the other hand, the Court is satisfied that any reductions pursuant to the policy's anti-duplication clause must be calculated based on plaintiff's entire loss rather than the policy limits, since the insurance policy does not contain a setoff provision. Setoff provisions typically provide that benefits otherwise payable under an insurance contract must be reduced by payments from legally responsible persons or organizations. The purpose of a setoff provision in an insurance policy "is to provide that the coverage limits for the underinsured motorist coverage represent the amount the insured is guaranteed to recover, if damages are sufficient, from all sources, *including the underinsured coverage itself*." *Mead v Aetna Casualty and Surety Co*, 202 Mich App 553, 556; 509 NW2d 789 (1993) (emphasis added).

The policy endorsement that the parties have submitted does not contain a setoff provision, nor does defendant Hartford allege that the policy contains a setoff provision. Since there appears to be no dispute that the insurance policy lacks a setoff provision, the Court should declare that any reductions pursuant to the anti-duplication clause be subtracted from plaintiff's entire loss rather than the insurance policy limits.

For the reasons set forth above, plaintiff's request to prevent Hartford from reducing uninsured motorist benefits based on duplicate workers' compensation benefits is DENIED. Silent intervening plaintiff Chubb's request that this Court grant partial summary disposition finding that Hartford is precluded from reducing plaintiff's UIM claim is also DENIED.

[2] Plaintiff also cites a number of cases from *other* jurisdictions for the proposition that an insurance contract cannot

However, the Court ORDERS that any reductions pursuant to the anti-duplication clause be subtracted from plaintiff's entire loss rather than the insurance policy limits. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

Cc: Michael Materna, Attorneys for Plaintiff

Timothy O'Neill, Attorneys for Defendant, Hartford

Timothy Moriarity, Attorney for Intervening Plaintiff, Chubb Ins. Co.

Michael Schaefer, Attoneys for Defendant, Nagy

William Cannon, Attorney for Defendant, Nagy

EDWARD A SERVITTO
CIRCUIT JUDGE

JUL 28 2006

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BY: Sandra A. Kopps, Court Clerk

excuse an insurer from duplicating benefits that have already been paid, but which are subject to a statutory lien.